THE LEGAL REMEDY FOR PLUTOCRACY.

Address by Edgar Howard Farrar, A.M., of New Orleans, La., Before the Society of Alumni of the University of Virginia, on June 17th, 1902.

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ADDRESS BY EDGAR HOWARD FARRAR, A. M., OF NEW ORLEANS, LA., BEFORE THE SOCIETY OF ALUMNI OF THE UNIVERSITY OF VIRGINIA, ON JUNE 17TH, 1902.

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Mr. Chairman, Fellow Alumni of the University of Virginia, Ladies and Gentlemen:

The generation of men to which I belong, who, full of hope and strength, left the precincts of this university thirty-one years ago, to enter upon the active duties of life, found themselves face to face with social and political questions that touched the foundations of the republic.

Those of us of Southern birth and bringing up (and then, as now, those who were not such were a negligible quantity) had seen in the impressionable period of youth the tide of civil war pour over our land, leaving behind a track of pillaged cities, devastated farms and denuded homesteads.

From out of this wreckage, with loving and self-denying hands, were garnered the almost tragic dollars that placed and kept us in the bosom of this our venerable and cherished mother. At the thought of the self-sacrificing gifts of those tender hands, now mostly folded forever, there wells up to each of our lips from each of our hearts a choking stream of prayers and blessings for a race of men and women, our fathers and mothers, scions of the Old South, who, though brought up in the arts of peace, yet

became in war antagonists that could be crushed by numbers, but not overcome, who, though nurtured in ease and affluence, yet accepted poverty with grace and contentment, who taught themselves and their children to rank principle above lucre, and whose ideal in public and in private station, in life, and in death, was honor. Peace to their ashes and unfading laurels to their memories forever.

The problems that came to them in their declining years, and to you in the vigor of young manhood, were to build up a wasted country, to revivify a perished commerce, to reorganize upon a new basis a destroyed society, to adjust in its proper place a once servile and inferior race, who, by the chicanery of politicians and the hypocritical snivel of sham philanthropists, had been placed with their heels upon your necks, to recover those rights of political and civil liberty taken from you by the angry passions of civic strife, to heal the gaping wounds caused by that strife, and to resume your hereditary place in the federal galaxy as the descendants of the men who had proclaimed the Declaration of Independence, and had with their blood and their fortunes established its principles as a common heritage for all their posterity.

Thanks be to God, after a generation of struggle you have achieved what you set out to accomplish. A few embers still survive from the conflagration of forty years ago, but without sufficient life to kindle a flame, and with constantly ebbing vitality.

The American Republic of Republics—"the indissoluble union of indestructible States"—has reached a point of unparalleled power, and has entered upon a career of unparalleled prosperity.

There is no one to oppress us or to make us afraid. Our autonomy and political liberties are beyond attack from outside. No nation, and no combination of nations, will assail the United States, unless the insolence that some-

times attends power shall induce us to depart from the safe lines laid down by the fathers of the republic, and to use that power to oppress, instead of using it to win the world by the arts of peace, and by the example of a free society teaching mankind that the people are fit for self-government, that true liberty exists only in the realm of wise law, that the real object of government is to promote the growth and development of the individual citizen, and that democracy ought to be the hope and the aim of all the nations of the earth.

We have, indeed, none to fear except God and ourselves. In the bosom of our society alone can arise and develop the evils that will work the downfall and ruin of the ideal of the republic. Causes that work to this end are deep seated and slow of operation. In their origins they are often imperceptible to the masses. They usually have their foundations in the rights of property, and in the inequalities begotten between individuals resulting from property rights, established and permitted by law in organized society which cannot exist without defining and protecting by law every species of property. Large inequalities necessarily arise between men based on natural gifts, and on the superior qualities of their ancestors.

To repress all inequalities, to force all men to a dead level, to restrain the activity and enterprise of the individual, and to take from him for the benefit of the incompetent mass what his skill and energy have acquired is the sodden dream of socialism, which thus seeks to reverse nature's universal law of the survival of the fittest by which she has climbed the scale of existence from the diatom to man, and has lifted man from the savage who cannot count beyond three to the mathematician who weighs the planets and measures the visible universe.

To foster and accentuate inequalities artificially and not naturally established, to give honors and privileges and

birthrights to particular classes, to perpetuate certain families as though they were made of a superior quality of flesh, and to that end to hold property out of commerce in the coils of entails, family compacts, uses and trusts, majorats, mayorazgos, marquisates, lordships, earldoms, dukedoms and all the accursed devices of feudalism to exalt the few and oppress the many, is the object and aim of every aristocratic form of government.

To affirm and guard the equal rights of all its citizens, to eradicate the last vestige of granted privilege, to keep the course free and fair that all contestants for honor or wealth may win on their merits, and particularly to stamp all policy and all legislation with the robust seal of the law of survival by which the strong and the fit will endure and the weak and the unfit will perish, is the true ideal of a republic.

With prophetic vision, and with a profound knowledge of the principle that adverse currents of polity cannot run concurrently in any society, but that one must prevail over the other, Mr. Lincoln said that this country could not exist half slave and half free. So also must it be said that it cannot exist dominated by both aristocratic and democratic doctrines.

Juxtaposition of such doctrines must beget an irrepressible conflict, and as the one kind or the other prevails, so will our society lean to democracy or to aristocracy.

But there is a congener of aristocracy, which springs from the same root, which is made fertile by the same conditions, which bears many of the same characteristics and which is a growth much more hostile and harmful to liberty. We call that foul weed plutocracy. It is the noxious form which aristocracy takes among a free, rich and prosperous people. It arrays itself at first with the wreath and toga of simplicity, but its progress to the crown and purple is

eager and rapid. Without the legal privileges, it apes the airs and manners and arrogates to itself the rights of the chartered superiors of mankind. It sets up liveries, and degrades free citizens by compelling them to wear this snobbish badge of servitude and inferiority. It manufactures for itself coats of arms and crests and pedigrees, although its progenitors were peasants and artisans from the first migration of the Aryan races down to its fathers. It baits its daughters with fat dowers to catch scrofulous lordlings or impecunious counts, desirous of redeeming their ancestral estates encumbered by the crimes and dissipations of their equally unworthy ancestors. Sometimes it betakes itself out of this plebeian land, upon the ground that no gentleman can live here, and seeks consort with kings and princes, and to win the guerdon of lordship by lavishing American gold upon the congenital paupers that crowd the almshouses of the realm. Sometimes it tickles its own vanity by abundant largesse to eleemosynary institutions bearing its own name. But the sphere where its power is to be dreaded, and not turned into ridicule, is that it tends to monopolize the nation's property, industries and sources of wealth, and to corrupt both the suffragans and the lawmakers of the land.

The problem that confronts us to-day, and that will confront our descendants for generations, is how to check this plutocratic growth without trenching on the principles of liberty and democracy.

It is not to be thought of for a moment that any restrictions be placed on the right and power of the individual to gain all the wealth he can by the lawful and honorable employment of his faculties. Spoliation of the rich by organized society is as bad as grinding the faces of the poor. Every one is the absolute owner of his own mental and physical powers, and has the unqualified right to exploit them under the moral law during his natural life

to their full extent, with due respect to the same right in every other individual. The despot and the socialist, who professes the worst form of despotism, alone deny this proposition.

We cannot, therefore, consistently with the principles of liberty, legislate so as to prohibit the accumulation of wealth by honest individual effort, but we can legislate consistently with those principles in two ways: first, so as to destroy the privileges out of which most of the great existing fortunes have grown; second, so as to prevent wealth from being hereditarily piled up in a few hands, so as to disperse it in accordance with the operation of nature's laws, and so as to keep it in commerce and out of the dead hand of the family compact and of the trust estate.

The main sources of privilege are protective tariffs, bounties from the public treasury, and the grants of franchises to exploit public utilities, which franchises are essentially common property, inalienable in their very nature, and, if exploitable by private enterprise at all, then only under limitations whereby they will revert at short intervals, and whereby the public will obtain their full value.

It is not my purpose to discuss to-day this branch of the problem propounded, nor to justify by argument the statements just made.

In my judgment the second branch is of greater importance than the first, because more far reaching, touching more closely the life of the people, and yet less generally known and understood.

Ought there to exist in any democratic society any rule of law by which the posthumous avarice, or vanity or family pride of a dead man can hinder or impede the welfare and progress of mankind?

The answer of right reason to this question is No!

The answer of the aristocrat and the plutocrat is that he is mankind (or the only part of it to be taken into consid-

eration), and he ought to have the right to perpetuate his fortune, and to fortify and protect his descendants. Such a one, having in life bestridden the narrow world like a colossus, desires when he falls from the pedestal, to provide for the erection of his successor, and his successor's successor to the end of time. He desires further the right, in case his successor should be of clay, and not of bronze, to stay and prop him with every form of vicious scaffolding that the ingenuity of lawyers can devise.

It is my purpose to demonstrate that essential parts of the system of laws generally prevailing in the United States not only permit, but foster the evil in question; that such system takes its origin in feudalism, and that in such respect it is hostile to the principles of democratic government.

In obedience to the general rule of development, that colonies adopt the law of the mother country, the common law of England was implanted on this continent, and it prevails to-day, modified sometimes by statute, in every State of the American Union but one, and in all the British Provinces, except Quebec.

Like every system of law, it bears the marks of the political and social struggles through which the people, among whom it grew up and was moulded, have passed since the dawn of history.

While on one hand it exhales the inspiring breath of liberty in the right of trial by jury, in the *habeas corpus*, in the right of petition, in the right of local self-government, in the citizen's freedom from taxation without his consent, in his right of representation in the law-making body, yet, on the other hand, it contains principles engrafted on it in the interest of that aristocracy, the creature of feudalism, which is now and has been for more than eight hundred years one of the dominant factors in the life of the English nation.

Primogeniture, the exclusion of female by male heirs, the entail of lands, the settlement of estates for lives in being and twenty-one years thereafter, the constitution of trust for accumulation and other purposes, are samples of these principles.

To these must be added (also the work of feudalism, as pointed out by Maine), the destruction of the limitations imposed by the ancient common law on the right of testamentary disposition, which, if not the same in nature, were the same in effect, as the forced heirship of the civil law; and the consequent establishment of that frightful doctrine now prevailing in England and generally in the United States, that a father of a family, for any reason that appears to him good, may cut off the inheritance of his children entirely, or may prefer any one of them and destitute the others for the favorite's benefit.

All of these malign principles were imported into the United States as part of the common law. Many of them remain in full force to this day, and, in my judgment, afford the firm foundation and vantage ground upon which plutocracy is erecting its anti-democratic superstructure.

It was early recognized that the right of primogeniture, or the right of the first born son to exclude all females and all subsequently born males from the inheritance, was inconsistent with republican government.

Mr. Jefferson accounted his authorship of the statute of Virginia abolishing this right as one of the grounds upon which his services to society rested.

It is no longer recognized in any of the American States, so far as I know; but, as I shall show directly, the unqualified power of disposition by testament produces the same effect, and from that effect grow the same evils that spring from the legally established right.

It has likewise been generally recognized, except perhaps

in Delaware, that entails should not exist in a free government.

The great apostle of liberty, whose name I have just called, made the first move on this continent to prohibit entails, and was the author of the statute of Virginia abolishing them.

In his autobiography, he gives his reasons for this measure, as follows:

"In the earlier times of the colony, when lands were to be obtained for little or nothing, some provident individuals procured large grants; and desirous of founding great families for themselves, settled them on their descendants in fee tail. The transmission of this property from generation to generation in the same name, raised up a distinct set of families, who, being privileged by law in the perpetuation of their wealth, were thus formed into a Patrician order, distinguished by the splendor and luxury of their establishments. . . . . .

"To annul this privilege, and instead of an aristocracy of wealth, of more harm and danger than benefit to society, to make an opening for the aristocracy of virtue and talent which nature has wisely provided for the direction of the interests of society, and scattered with equal hand through all its conditions, was deemed essential to a well-ordered republic."

His authorship of the statute named he also considered one of the benefits he had conferred on his fellow-citizens.

That entails were contrary to the true spirit of Saxon freedom appears in the sturdy struggle made to everthrow them. Strict entails were imposed by the barons in the reign of Edward I by the statute "De Donis." For two hundred years thereafter in every Parliament attempts were made to repeal that statute, but the House of Lords would not permit the repeal. Finally the courts invented the fictitious proceeding called a "common recovery," and sub-

sequently, by a doubtful interpretation of a statute, another fictitious proceeding called the "levying of a fine," by which an entail could be barred. They can now be barred under the statute of 1833 by a deed enrolled in the Court of Chancery.

But while entails can be barred in England and are prohibited in the United States, nearly all the evil results that flow from the legal declaration of such a system, can be, have been, and are daily set up in both countries by the operation of the family compact and the trust estate.

We have among us many notorious instances of the family compact, the most conspicuous of which occur in two well known New York families, resulting in the piling up of fortunes, the magnitude of which make insignificant the "wealth of Ormus and of Inde," that fired even the glorious imagination of John Milton.

These results have been accomplished by the handing down from father to son for three or four generations of the fixed tradition and compact that each testator shall leave the whole, or the bulk, of the family fortune to some one member thereof, who shall in turn do likewise, and whose descendants for all time shall keep up the tradition. If these fortunes have become so great in one century, what will they become in another? Property in the great commercial heart of the Union that passes into the hands of the reigning Astor or Vanderbilt passes absolutely out of commerce, and the plain citizen who lives upon it and pays rent for it, has no more hope that either he or his descendants can ever get an opportunity to own it by lawful purchase, than the Irish peasant has that he can buy the few acres of bog on which he and his ancestors have lived from time immemorial.

But these days of prosperity and privilege have begotten other fortunes which have assumed gigantic proportions in first hands.

With the law as it is, their owners have the power to establish similar family compacts, and thus prevent the dispersion of their wealth at their decease. Exploited under these conditions, what will the fortune of Mr. Rockefeller, or Mr. Morgan, or Mr. Carnegie become in three generations more? How much more of the productive territory of our fertile land will pass into this family mortmain—this dead hand with unclenchable grasp?

What will be the condition of the republic as time goes on, with the holders of these enormous fortunes standing athwart every avenue of profit, owning the choice places of the earth, controlling the great lines of transportation, with power to punish with financial blight and disaster any man, or even any community, bold enough to oppose them, and with power to elevate and make prosperous every sycophant who bows down and worships them?

The situation presents itself to every thinking man as one to which some conservative remedy must be applied.

Another legal stronghold of aristocracy and plutocracy is the doctrine of uses and trusts.

According to the recognized rule in England and in most of the United States a man may tie up his estate in the hands of trustees for any number of lives in being and twenty-one years thereafter.

In some of the States this power has been cut to two lives. Under this system, a man may select any number of infants, and if any one of them happens to be long lived and vigorous, the estate may be tied up out of commerce in the hands of trustees for a century. Not only is the property covered by the trust out of commerce, but the estate is not dispersable during this period. If the beneficiary should become insolvent, his creditors can only take the income that would enure to him. They cannot sell and scatter the property. The grip of the trustee remains, possibly, for an unborn heir.

Another form which such trusts may take is that for purposes of accumulation. One may devise his property in trust to accumulate in the hands of a trustee, by adding income to principal during lives in being, and twenty-one years thereafter, and direct the payment of the whole accumulated estate, at the death of the last among the persons named, to the then surviving children or grandchildren. The monstrous outcome of this doctrine was brought home to the English people by the will of an old miser named Thellusson, the validity of which the courts maintained, whereby he was able to tie up an estate of five hundred thousand pounds for three generations, the accumulation of which it was calculated would amount to one hundred millions of pounds, if any one of his grandchildren lived to be one hundred years old.

Parliament promptly passed an act, which is popularly known by the name of the miser, limiting the power of accumulation to twenty-one years after the death of the settler, or during the minority of the beneficiary.

But the Thellusson act is not part of the law of the United States, and the old rule of accumulation still prevails generally in this country, modified as to term in some of the States by statute.

Still another form which such trusts may take is what is popularly styled a "spendthrift trust."

It is the device usually employed by the fond parent to protect the idler, the incompetent, the weakling, the gambler and the debauchee from the natural and legitimate consequence of his own acts. Left to such consequences, the career of such a one would be short, and it is to the interest of society that it should be short. Nothing can be more pernicious to good morals and to the public welfare than the constitution of such trusts. It is almost like erecting all over the body politic fortresses from which the depraved may sally with impunity and to which they

may return at pleasure for recuperation and safety. They cultivate and coddle forms that ought to perish. They promote extravagance and dishonesty. They create the same conditions out of which grew up a worthless and depraved class that were the shame and sorrow of France under the old regime, and out of which the same class must and will grow up wherever they are permitted. Indeed, there are evidences among us that such a class is forming. Its seed corn is found in that host of vapid, cane-sucking dudes who delight to disguise themselves in speech and habit like foreign cads, and whose present highest ambition is to be arrested for running over somebody with an automobile.

The approved form of such a trust, and one which I regret to say has passed muster in the Supreme Court of the United States, is this: Property is given or bequeathed to a trustee to pay the income to a named person during his life, and after his death in trust for his children who attain majority, with the proviso that if the beneficiary should alienate or dispose of the income given, or, if by bankruptcy, or insolvency, or any other means whatever, the said income can no longer be personally enjoyed by him, but the same would be vested in or payable to some other person, then the trust to pay the income ceases, and thereafter it is to be paid to his wife, or his children, or, if at that time he has no wife or child, the income accumulates during his life, or until he has a wife or child; with the further power in the trustee, after the income has been forfeited, to apply so much of it as he may choose to the use and benefit of the beneficiary. The beneficiary may even be one of the trustees for his own benefit, and after his bankruptcy may, by collusion with his co-trustee, pay over to himself as much of the legally lost income as he chooses. This comes as near as possible to proving that

there is an exception to the supposed maxim that one cannot eat his pie and have it at the same time.

Some of the courts of this country have issued their *ipse dixit* that such trusts are not against public policy. An examination of those opinions will demonstrate that the question is not looked into analytically or historically. They are based upon that savage and unchristian doctrine of ownership which holds that one may do, alive or dead, what he pleases with his own, or upon a sentimentalism, which, in the name of humanity, love and affection, imposes the selfishness of the individual as a burden upon the body of society; and they show a lamentable knowledge of both history and political economy.

The interests of humanity and society concur, but there is a point where the interest of society begins long before the claims of personal love and affection end. Therefore, the interests of humanity and society can always be reconciled, while those of society and of individual love and affection cannot. It is the desire of love and affection, and all the other sentiments, to guard and preserve their object, but that object may be something injurious to society, something which its best interests require to be eliminated. If the means permitted to the individual to guard and protect the object of his affections will produce more harm than good to the many, then such means must be prohibted.

In order, therefore, to determine whether a given thing is against public policy, we must look to its general tendency, and not to how it may work in a particular case, and above all we must read the page of history to find out how it has worked among peoples where it was permitted.

Spendthrift trusts are condemned in England as against public policy.

It is a matter of legal history that the whole doctrine of trusts had its origin in fraud.

The *fidei commissa* of the Roman law, the parent of the

modern equitable doctrine of trusts, were practiced for the purpose of establishing an order of succession different from that ordained by law, and to evade those provisions declaring certain persons incapable of inheriting.

Whilst existing in fact during the whole period of the republic, they were not recognized, nor enforceable, until made so by Augustus under the empire.

There is no doubt that the object and purpose of the statutes of Richard III and Henry VIII were to abolish and prohibit every form of trusts which were then called uses, and which had become a great abuse in the kingdom; but by the cunning and pious fraud of the chancellors, who were then ecclesiastics, they simply changed the name of the thing from a use to a trust, and they and their lawyer successors went on gradually building up that great mass of judge-made law now administered in courts of equity, and which, as I have already mentioned, grew up under the pressure of a greedy and domineering aristocracy.

In process of time the judges were confronted with the question of perpetuities, *i. e.*, the tying up of property in such a way that it would not vest for several generations. They entertained no doubt that a perpetuity was against public policy. As the matter was put much later: "A perpetuity is a thing odious in the law and destructive to the commonwealth. It would stop commerce and prevent the circulation of property."

At first the judges limited the power to tie up an estate to one life. But apparently the pressure against them was too strong. The common law judges having invented the plan of barring entails, the pride of family required some other means of perpetuating the family estate. As stated, a moment ago, the feudal power gradually destroyed the restrictions of the common law on the right to dispose by will, and established the unlimited power to dispose of one's

estate. Hence, as Lord Bacon says, a refuge was sought in perpetuities.

To maintain itself, the aristocracy needed the power to tie up its property for more than one life, and it got that power; because the doctrine was gradually extended until at last it was settled that the power to tie up might extend over any number of lives in being and twenty-one years, and nine months if necessary, thereafter.

In this shape American lawyers and judges imported this doctrine into this country, because they found it in the only books they read and studied, and they knew no other. They apparently never stopped to think whether it was consistent with the principles of our government, and were caught in its toils before they realized the end to which, under changing conditions, it might lead.

Strange to say the bulk of this importation was made after the revolution had separated us from the mother country. Prior to the revolution there were rudimentary beginnings of equitable jurisdiction and doctrines in some of the colonies, and in others none. Now, the full flower blows all over the land.

This introduction, in my judgment, was due to three causes: first, to that ingrained spirit of routine which makes it easy to follow a beaten track, especially when one is educated in that track; second, to the undoubted existence in this country during the first forty years after the revolution of an influential aristocratic party which, under the leadership of Hamilton and his confreres, sought to increase and concentrate the powers of government and to destroy, as far as possible, the rights of the people; and, third, to the reaction caused during the same period by the atrocities of the French Terror, committed in the name of liberty, a reaction which chartered every defender of an ancient abuse to paralyze the reforming influence of the liberal minded man by denouncing him as a Jacobin,

which produced in England laws, the enforcement of which, as Lord Campbell says, would have made Englishmen slaves or revolutionists in order to escape servitude, which gave rise to that gloomy period in our politics so pathetically described by Mr. Jefferson in his memorial to the legislature of this State, and which finally culminated in the Holy Alliance—that conspiracy between the crowned heads of Europe to crush republican government wherever it should raise its head.

Conclusive proof of the pernicious influence upon the life of a nation of trust estates, operating through a long period, and of the theme which I uphold, that they are the main prop of aristocracy and its congener, plutocracy, is found in the history of France, and in the opinions of her great statesmen and law writers.

These same trust estates, from their origin in the Roman law, are known under the French law as substitutions, or to speak more strictly, fidei-commissary substitutions. They are sometimes called simply *fidei commissa*, which is nothing but the Latin for the English term "Trust Estate."

Their injury to the commonwealth was recognized at an early period. The property of the realm passed out of commerce and was concentrated in great estates, the possessors of which were not the owners. An idle class of spendthrift debauchees arose, who would not pay their debts, and whose creditors could not levy. The natural order of succession and distribution was turned aside. The courts were filled with scandalous litigations to protect the interests of the remote beneficiaries from waste; and there was built up, to confound the student and the judge, an enormous and intricate mass of law, defining the rights and duties of the parties, which was absolutely beyond the comprehension of laymen, and which was interpenetrated with all the subtleties and bristling witth all the quibbles of scholasticism.

As early as 1560, by the ordinance of Orleans, substitutions were limited to two degrees, or, in other words, to two generations. This is practically the same as the English rule against perpetuities. Justinian had limited them to four generations. But this ordinance did not even mitigate the evil. The feudal sentiment, aided by the ingenuity of lawyers and the complaisance of the courts, found means to evade the prohibition, so that substitution was piled on substitution, and no sooner was property out of one net than it immediately passed into another.

The same rule was re-enacted by the ordinance of 1747, but with the same results; and the nation moved on, groaning under its burden, to meet the catastrophe of the revolution, when the whole miserable system was wiped out by the law of November 14, 1792. This law was no frenzied outburst of the *sans culottes*. It simply gave effect to the unanimous opinion expressed through more than two hundred years, of all the great jurists of France, that substitutions were odious, embarrassing, the matrix of fraud, and *non satis republicæ expedientes*.

Although there is some apparent conflict in his deliverances, Montesquieu said in his Persian Letters that substitutions were useful only in an aristocracy, but that they should not be permitted either in a monarchy or in a democracy, except in a very limited degree, and under the most stringent regulations.

Chancellor D'Aguesseau said that the best of all laws would be that entirely abrogating all *fidei commissa*.

Cardinal Mantica gives the names of a host of learned doctors who had declared against substitutions and *fidei commissa*, and sums up twelve cogent reasons against their existence.

In the discussions which took place over the Civil Code of 1804, all the jurisconsults expressed their utter disapprobation of substitutions, and Napoleon himself, who, as

First Consul, took part in those discussions, declared that their only purpose was to maintain the so-called great families, and to perpetuate in their eldest sons the splendor of a great name, and that they were contrary to good morals and to reason. When he forgot his republican principles and set up the empire, he re-established substitutions in support of the majorats or landed estates descending with an honorary title created by him. The Restoration of the Bourbons, which followed the empire, abolished majorats and re-established substitutions, but the republican government of 1849 again swept them away.

Marcadé, one of the great modern commentators, says: "There is little legislation which has undergone so many changes as that relative to fidei-commissary substitutions, and the cause of it is that there is no other subject than this more closely allied to governmental forms and holding more intrinsic relation to political systems."

Demolombe, another of such commentators, says: "Among all the subjects of private law, substitutions are most closely attached to public law, and therefore they must inevitably receive the shock of the revolutions which take place in the form of government and the political system of the country. Hence the history of substitutions in the last half century is nothing more than the history itself of our changes of constitution."

The same close connection between the form of government and substitutions is exhibited in Belgium and Spain.

In Belgium they fell with the empire and have not been re-established.

In Spain the mayorazgos, established by the laws of Toro, and all forms of *fidei commissa* were abolished when the liberals came into power in 1820 and forced Ferdinand the VII to restore the Constitution of Cadiz. They were re-established in 1823, when the constitutional system was overthrown by the Holy Alliance, who sent the Duke of

Angouleme into Spain with a hundred thousand men at his back to suppress the aspirations of a brave people for liberty and to re-inaugurate the absolute power of the most despicable and degraded wretch that ever disgraced humanity.

When the liberals again attained power in 1836, they forced the Queen Regent to restore by decree the law of 1820; and under the constitution of 1837, the Cortes in 1841 reinforced the Act of 1820.

The historian Mariana says that this law released more than half of the capital and property of Spain from the clutches of a system which a learned Spanish judge denounces as "repugnant to the principles of wise and just legislation," and as "the abortion of the monster of feudalism."

Jovellanos, DeCastro, Sempere, and in fact all of the Spanish jurists, are as unanimous as the French jurisconsults in their hostility to fidei-commissary substitutions.

Struck by the apparently necessary connection between the downfall of substitutions and the rise of the power of the people, the learned professor of law in the University of Ghent says: "The future belongs to the democracy; and whether we rejoice at it or deplore it, it is a fact, and a providential fact against which all the efforts of the men who belong to the past have broken in shipwreck. Reactionary laws have all been repealed, and the democratic wave rolls on increasing. We must make room for it in society, or it will brim over and destroy everything."

It is the general opinion of the political economists who have touched this question—and I must say there is a great dearth of discussion on the subject among them—that laws relative to inheritances are the most powerful means of acting on the distribution of the wealth of a country.

Mr. Jefferson thought that the best of all agrarian laws is the law of equal distribution.

DeTocqueville said that he was "surprised that ancient and modern jurists have not attributed to the law of inheritance a greater influence on human affairs. It is true these laws belong to civil affairs; but they ought nevertheless to be placed at the head of all political institutions; for they exercise an incredible influence upon the social state of a people, whilst political laws only show what the State already is. They have moreover a sure and uniform manner of operating upon society, affecting as it were generations yet unborn. THROUGH THEIR MEANS MAN ACQUIRES A KIND OF PRETERNATURAL POWER OVER THE FUTURE OF HIS FELLOW CREATURES. WHEN THE LEGISLATOR HAS ONCE REGULATED THE LAW OF INHERITANCE, HE MAY REST FROM HIS LABOR. THE MACHINE ONCE PUT IN MOTION WILL GO ON FOR AGES AND ADVANCE AS IF SELF-GUIDED TOWARDS A POINT INDICATED BEFOREHAND. WHEN FRAMED IN A PARTICULAR MANNER THIS LAW UNITES, DRAWS TOGETHER AND VESTS PROPERTY AND POWER IN A FEW HANDS; IT CAUSES AN ARISTOCRACY TO SPRING, SO TO SPEAK, OUT OF THE GROUND. IF FORMED ON OPPOSITE PRINCIPLES, ITS ACTION IS STILL MORE RAPID; IT DIVIDES, DISTRIBUTES AND DISPERSES BOTH PROPERTY AND POWER."

In my humble judgment no profounder truth was ever formulated than the one contained in the quotation I have just read.

Exactly the same idea is set forth in the great oration pronounced by Mr. Webster on December 22, 1820, the two hundredth anniversary of the landing of the Pilgrims. He declared that "a republican form of government rests not more on political constitution than on those laws which regulate the descent and transmission of property," and that "governments like ours could not have been maintained where property was holden according to the principles of the feudal system."

Speaking further of the conditions under which the pilgrim fathers reached these shores, he said:

"Their situation demanded a parcelling out and division of the lands, and it may be fairly said that this necessary act *fixed the future frame and form of their government.* The character of their institutions was determined by the fundamental laws respecting property. The laws rendered estates divisible among sons and daughters. The right of primogeniture, at first limited and curtailed, was afterwards abolished. *The entailment of estates, long trusts, and other processes for fettering and tying up inheritances, were not applicable to the condition of society and were not made use of.*"

He then proceeded to venture a prediction, based on the principle he had announced, that the laws of property and inheritance regulate the form of government. The French monarchy had but lately been replaced on the ruins of the empire, but it had not touched the law of forced heirship, nor the rule of equal distribution of property established by the Napoleon Code, which was the outcome of the revolution. He said: "If the government do not change the law, the law in half a century will change the government, and this change will not be in favor of the power of the crown but against it."

His prediction was verified in twenty-eight years. The *coup d'etat* of Napoleon III reversed the current for two decades, but France to-day is solidly fixed upon a republican foundation, and her lawyers, her statesmen, her political economists and her historians unanimously ascribe the breadth and firmness of that foundation to her inheritance laws and to her prohibition against fidei-commissary substitutions.

Standing upon the shoulders of these eminent statesmen and observers, even a pigmy can see into the future, and the humblest thinker can safely venture the prediction that UNLESS THE AMERICAN STATE GOVERNMENTS CHANGE

THEIR PROPERTY LAWS, THOSE LAWS WILL, IN PROGRESS OF TIME, CHANGE NOT ONLY THOSE GOVERNMENTS, BUT THAT OF THE FEDERAL AGENT AS WELL.

Under such influences, this change of government will either come by revolution or by imperialism; by revolution where the great masses, deprived of hope, seeing nothing for them and their children forever but the life of mere expletives to receive slim salaries, or a scanty wage, and seeing the whole horizon of the future filled by gigantic forms, thrust forward by an apparently irresistible power, coming out of the past and intrenched in the law, rise in the desperation of a blind Samson and pull down the whole temple of society; by imperialism, where, like in Rome, the forms of the republic will be scrupulously kept, down to the naming of the smallest constable, but the powers of government will be deposited beyond the control or reach of the people.

It is useless for us to brag and boast, and say that we are exempt from the laws that govern the growth and development of society, and that the same social forces that have operated under similar conditions among other peoples cannot produce the same results among us. It is the part of wisdom to change the conditions, and to seek remedies that will check evil tendencies.

We have those remedies at hand. They are not new, nor of small authority, nor untried. On the contrary, they are honorable with years, they bear the imprimature of "the great of old, the dead but sceptered sovrans who still rule our spirits from their urns," and they are and have been practiced in the civilized nations of the earth.

These remedies are the establishment of forced heirship and the absolute prohibition of every form of trust estates.

Under the custom of our Saxon forefathers, traces of which were found even down to the time of Charles I, no father of a family had absolute power over the disposition

of his estate. One-third went to his wife, one-third to his children, and one-third was at his disposal.

The corrupt period of the Restoration, when all laws, human and divine, were relaxed, appears to be that in which the unqualified power to dispose of both real and personal estate was finally established. This change, as shown just now, was the work of feudalism. It rolled back the law of England to the law of the XII Tables. It was an example of legal atavism whereby an ancient and lower type reappeared clothed with all of its pristine hardness and cruelty, and purged of every softening influence which sixteen hundred years of civilization and of Christianity had injected into its composition.

Even before the benign influence of the Christian religion began to work upon the civil law of Rome, a pagan society had found a means to modify and control the mandate of the ancient law—*uti legassit, sic lex esto*—by giving excluded heirs an action before the Prætor, called *Querela Inofficiosi Testamenti;* or, as it has been well translated, "The Plaint of an Unduteous Will," which was based on the presumption that one who had violated in his testament the ties of family, the duty of a parent, or the dictates of natural affection, was essentially *non compos mentis*, and devoid of testamentary capacity.

An analogous action exists to-day in the common law countries, whereby wills are attacked for undue influence; and juries and surrogates, in order to remedy a rank injustice, catch at the smallest straws, and often violate every rule of evidence, of logic, and of common sense, to overthrow a will. These melancholy actions which rake the dust off of buried scandals, which draw from their closets the hideous family skeleton, which sever the ties of kindred, which cast fire-brands into peaceful and united households, are not permitted where forced heirship prevails. As soon as forced heirship was established in Rome

the *Querela* was reduced to a mere action for the recovery, or the supplement of the legitimate portion. Under the Code Napoleon, no proof is admitted that a testamentary disposition was made through anger, hatred, suggestion or captation.

Forced heirship, or the reservation in the ascending and descending line of a certain portion of an estate, is the law to-day of every civilized country of the world, except England, and her present and former colonies, and in some form it has been the law of the European countries since they were Roman colonies. Nowhere are the ties of family more closely knit than in those countries. Children are as obedient and as dutiful as in England, or in the United States. Disinherison is not permitted except upon grounds that rest in the law of nature, and society is saved from such tragedies as that which lately sent a thrill of horror through this land, when a wrongfully disinherited son became both a fratracide and a suicide.

Under the operation of such a law the family compact necessarily and inevitably disappears, because it is expecting too much of human nature to suppose that those who are entitled by law to a share in a large estate would voluntarily surrender it.

I do not hesitate to affirm that if this law had prevailed in New York, both the Astor and the Vanderbilt fortunes would by this time have been dispersed.

It has had an equalizing and dispersing effect wherever applied, and it must have the same effect when applied here.

We can never say that we have abolished primogeniture as long as one may by will leave all his property to his eldest son, and agree with him that he in turn shall leave all his property to his eldest son; and it cannot be gainsaid that primogeniture, or anything that is its equivalent, is hostile to the fundamental principles on which our govern-

ment rest. With this cancer in our vitals, we can never realize the maxim propounded by Daniel Webster, that "subdivision of soil and equality of condition are the true basis of a popular government."

Operated by themselves under the rules of forced heirship, which include the principle that the legitimate portion must go to the forced heir absolutely unfettered with conditions and limitations, trust estates, or executory devises, or substitutions, or *fidei commissa*, or whatever the thing they all essentially represent, may be called, are curtailed of part of their power of injuring the commonwealth.

But when they are permitted to be operated in conjunction with the unlimited power of disposition, then we are confronted with all the evils not only of primogeniture, but of entails. For in such case there is nothing to hinder the concentration of a whole estate in one heir, and the piling of a trust on top of a trust, just as the French lawyers piled substitution on top of substitution, thus keeping the property perpetually out of commerce: because there is no reason why a remote beneficiary should not transfer the property, as soon as it vests in him in trust for another remote beneficiary, and so on *ad infinitum*.

Large estates, however, may be owned by persons who have neither ascendants nor descendants nor any relatives who could properly be placed in the catagory of forced heirs. How regulate their estates? The answer is that childless men are the exception to the rule. But, by the absolute prohibition of all trusts except purely naked trusts, such as executorships, guardianships of minors, and of persons *non compos*, assigneeships in bankruptcy and insolvency and the like, we not only reach this exceptional class, but all others who may desire to tie up property and keep it out of commerce, whether to build up their own families, or to accumulate an enormous estate for some remote heir,

or to ensure an unfailing supply of funds to minister to the wants and vices of some decadent. To say that there may be cases where a trust is necessary to provide for the welfare of a helpless person, is no answer to the proposition, because the case put is exceptional, and because while society, from motives of humanity looks after the infant, the feeble-minded and the feeble-bodied, for whose benefit naked trusts are admissible, it is clearly against its interest to constitute itself a hothouse for the cultivation and reproduction of fragile forms that cannot stand contact with the affairs of everyday life. Besides, experience with the operation of this prohibition in countries where it applies, has worked nothing but good, and has tended to develop self-reliance and capacity for affairs among the people.

The extent to which the property of this republic is being tied up in trust estates is appalling. I believe that authentic statistics on the subject would shock the nation from centre to circumference; and it is to be hoped that in the next census some investigation may be made of this grave question.

The conditions have fundamentally changed in the last eighty years.

Although the pilgrim fathers may not have used "long trusts and other processes for fettering and tying up inheritances," because inapplicable to their conditions, their descendants, as well as those of the cavaliers, and particularly the holders of large fortunes, are daily forging legal chains to shackle their estates to the uttermost limit their advisers think will run the gauntlet of the courts.

They are no longer troubled with the old question of the shortness of life, or the insolvency or the incompetency of their trustees. Corporations of indefinite existence, with great capital stocks, and keen business men at the fore, now perform the duties and functions of trustees. In every

metropolitan city, these trust corporations have sprung up with startling rapidity.

In the City of New York alone there are thirty-seven of such companies, with an aggregate capital stock of $98,000,000. Assuming them to have, on the average, the prosperity of one small company in a Southern city, which I know holds $35,000,000 of property in trust estates, there being two other trust companies in the same city, and we reach the startling figure of over one thousand millions of such property as the probable holdings in trust of these New York companies alone, without reference to the holdings of similar strong companies in the other great centres of population.

No doubt there is a large field in business and in society in which these companies can and do operate with no other result but good to individuals and to the community. For these purposes they ought to be permitted and even encouraged. But when they are yoked up in harness with our existing property laws, and are made the depositaries in trust of the fortunes of all the rich men in the commonwealth, then government by the people will cease, and government by trust companies will begin.

For these reasons, I have long maintained the opinion, and deem it my duty, as an alumnus of the institution founded by the father of American liberty, to express here to-day the opinion, that the only effectual way to arrest the progress of plutocracy in this republic, is to set our laws of property and the right to inherit and to dispose of property by will back again upon lines as near as possible to those simple and uncomplicated rules that prevailed among our Saxon ancestors, to purify the law of the land with democratic fire, and to pluck up by the roots the last remnant of feudalism with which our society is tainted.